Supreme Court, U.S.
FILED
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No. 03-879

IN THE SUPREME COURT OF THE UNITED STATES

COMMISSIONER OF REVENUE FOR THE COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

H.J. WILSON COMPANY, INC.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether Congress has the authority to abrogate State sovereign immunity under the Bankruptcy Clause of Article I, U.S. Const., art. I, § 8, cl. 4.

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Petition For a Writ of Certiorari

The Attorney General of the Commonwealth of Massachusetts, on behalf of the Commonwealth and its Commissioner of Revenue, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit (App. A, A-1 to A-5, *infra*) is reported at 333 F.3d 666 (6th Cir. 2003). The opinion of the United States District Court (App. D, A-8 to A-16, *infra*) is reported at 265 B.R. 917 (M.D. Tenn. 2001). The opinion of the bankruptcy court (App. E, A-17 to A-26, *infra*) is reported at 262 B.R. 738 (Bankr. M.D. Tenn. 2001).

Jurisdiction

The court of appeals entered its judgment on June 24, 2003 (App. B, A-6, *infra*), and entered its order denying the Commonwealth's petition for rehearing en banc and rehearing on September 12, 2003 (App. C, A-7, *infra*). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). This petition questions the constitutionality of an Act of Congress, and 28 U.S.C. § 2403(a) may apply. On September 26, 2001, the court of appeals certified to the Attorney General of the United States the fact that the constitutionality of an Act of Congress was in question, and on or about January 3, 2002, the Attorney General filed with the court of appeals a notice of non-intervention on behalf of the United States.

Constitutional and Statutory Provisions Involved

The Bankruptcy Clause of the Constitution grants the following power to Congress:

> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

U.S. Const., art. I, § 8, cl. 4.

The Eleventh Amendment to the Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of a Foreign State.

U.S. Const., amend. XI.

The Bankruptcy Code provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Section[]. . .505. . .of this title.
>
> (2) The court may hear and determine any issue with respect to the application of such section[] to governmental units.
>
> (3) The court may issue against a governmental unit an order, process or judgment under such section[] or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery....

11 U.S.C. § 106(a) (1), (2), (3).

The Bankruptcy Code also provides:

> (a) [T]he court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

11 U.S.C. § 505(a)

Statement of the Case

H.J. Wilson Company, Inc. ("HJW"), respondent, is one of several wholly-owned subsidiaries of Service Merchandise Company, Inc. In tax years 1987-1992 Service Merchandise incurred certain operating expenses which it allocated to its subsidiaries, including HJW. HJW's Massachusetts corporate excise tax returns for these years claimed deductions for the allocated expenses. [App. A-2]

The Commissioner disallowed the allocated expense deductions and assessed a tax deficiency of approximately $1,098,938.43 against HJW. HJW paid this amount to the Commonwealth in 1991 and 1994, and requested an abatement of the assessment, which the Commissioner denied. HJW filed a timely petition for review with the Massachusetts Appellate Tax Board; that petition is pending at the Board. [App. A-2]

In March 1999 Service Merchandise and its subsidiaries, including HJW, filed voluntary petitions under Chapter 11 of the Bankruptcy Code. In August 2000, HJW commenced an adversary proceeding against the Commonwealth in the bankruptcy court seeking a money

judgment for the tax refund it claimed was due, with interest.[1] [App. A-2-3] The Commonwealth filed a motion to dismiss the complaint for lack of jurisdiction on the ground of its sovereign immunity under the Eleventh Amendment, relying on Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).[2] The Commonwealth also requested discretionary or mandatory abstention under 11 U.S.C. §1334(c)(1) or (2). [App. A-3; A-9; A-17-18]

HJW asserted that the basis for federal jurisdiction over the adversary proceeding in the bankruptcy court was the following provisions of Title 28 [App. A-22]:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) [T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(a), (b).

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a

---

[1] Accrued interest brought the amount of HJW's claim above $3 million. [Affidavit of Thomas Condon, Joint Apx., Tab 8, p.85, ¶9.]

[2] The parties and the courts below recognized that the Commonwealth is the true party in interest, although the Commissioner is the nominal defendant. [App. A-8,9; App. A-19]

> case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 157(a).[3]

HJW also asserted that the Commonwealth waived Eleventh Amendment immunity by filing proofs of claim in the bankruptcy case for unpaid sales taxes for the tax periods September 1996 through March 1999. [App. A-14]

The bankruptcy court denied the Commonwealth's motion to dismiss, holding that the Bankruptcy Clause expressed a valid waiver of State sovereign immunity, and also denied the Commonwealth's abstention request. [App. A-18-21, A-21-26] The bankruptcy court did not address the effect, if any, of the Commonwealth's proofs of claim.

The Commonwealth appealed the bankruptcy court rulings to the district court. Applying the reasoning of Seminole Tribe, the district court reversed the bankruptcy court's order denying the Commonwealth's motion to dismiss, holding that the Commonwealth was entitled to Eleventh Amendment immunity from HJW's adversary proceeding. [App. A-10-14] The district court further held that the Commonwealth's proofs of claim did not waive its immunity. [App. A.14-16] The district court did not address the abstention issues. [App. A-16]

HJW appealed the district court's rulings to the Court of Appeals for the Sixth Circuit. While HJW's appeal was pending, and after submission of briefs, a different Sixth Circuit panel entered its decision in Tennessee Student

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[3] Although not a matter of record, it is undisputed that the District Court for the Middle District of Tennessee has entered an order of reference of bankruptcy cases that applies to this matter.

Assistance Corporation v. Hood (In re Hood), 319 F.3d 755 (6th Cir. 2003), cert. granted, 124 S. Ct. 45 (Sept. 30, 2003) (No. 02-1606). Relying on Hood, the panel in this case reversed the district court, ruled that the Eleventh Amendment did not bar HJW's complaint, and remanded the case to the district court for consideration of the abstention issues. [App. A-5, A-6]

The Court of Appeals denied the Commonwealth's petition for rehearing en banc and for rehearing. [App. A-7] The Commonwealth filed a timely motion to stay the mandate, which has not been acted on. The Court of Appeals has not issued its mandate.

Argument

This case presents the question whether the Article I Bankruptcy Clause power can be used to abrogate the constitutional limitations placed upon federal jurisdiction by the Eleventh Amendment. The same question is currently before this Court in Hood, No. 02-1606.

In Hood, the Sixth Circuit held that because the Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies," Congress had constitutional authority to abrogate State sovereign immunity under Bankruptcy Code 106(a), despite this Court's holding in Seminole Tribe that Congress could not abrogate sovereign immunity when exercising other powers under Article I. Seminole Tribe, 517 U.S at 72-73. The Sixth Circuit relied expressly on Hood in this case. [App. A-4]

The precise question in Hood was whether the abrogation of sovereign immunity set forth in 11 U.S.C. § 106(a) validly authorizes the bankruptcy court to enter an order against the State of Tennessee discharging a Chapter 7 debtor's educational loan pursuant to 11 U.S.C. §523(a)(8). Section 523 is one of sixty sections of the bankruptcy code set out in §106(a). Section 106(a)

expressly abrogates sovereign immunity with respect to all sixty of these sections.

In this case, the Sixth Circuit upheld abrogation with respect to Section 505, also one of the sixty enumerated sections. Section 505(a) purports to grant the bankruptcy court unlimited authority to "determine the amount or legality of any tax...whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction." In upholding abrogation in this case, the Sixth Circuit expanded its holding in Hood far beyond the discharge of a loan. HJW seeks to by-pass the Commonwealth's statutory tax abatement procedures and its own pending petition to the Appellate Tax Board, reach into the Commonwealth's treasury, and procure a multi-million dollar money judgment for a tax refund in the Tennessee bankruptcy court.

This Court's resolution of the question presented in Hood will likely resolve the abrogation question for all sixty sections of the bankruptcy code listed in §106(a), including the discharge (§ 523) and tax (§ 505) sections.

Conclusion

The Commonwealth's petition for certiorari should be held pending the Court's decision in Hood, No. 02-1606, and then disposed of as appropriate in light of the decision in that case

Respectfully submitted,

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Counsel of Record

Date: December 8, 2003

Appendix A

A. Opinion of the Court of Appeals for the Sixth Circuit Entered in Conjunction with the Judgment Sought To Be Reviewed.

H.J. Wilson Company, Inc. v. Commissioner Of Revenue For The Commonwealth Of Massachusetts (In re Service Merchandise Company, Inc., et al., Debtors), 333 F.3d 666 (6th Cir. 2003).

June 17, 2003, Argued; June 24, 2003, Decided; June 24, 2003, Filed.

Argued: Charles F. Smith, Skadden, Arps, Slate, Meagher & Flom, Chicago, Illinois, for Appellant; Jeffrey S. Ogilvie, Commonwealth Of Massachusetts Department Of Revenue Litigation Bureau, Boston, Massachusetts, for Appellee

On Brief: Charles F. Smith, John William Butler, Jr., Skadden, Arps, Slate, Meagher & Flom, Chicago, Illinois, Paul G. Jennings, Beth A. Dunning, Bass, Berry & Sims, Nashville, Tennessee, for Appellant; Jeffrey S. Ogilvie, Commonwealth Of Massachusetts Department Of Revenue Litigation Bureau, Boston, Massachusetts, David T. Axford, Kitch & Axford, Nashville, Tennessee, for Appellee.

Before: Martin, Chief Circuit Judge; Krupansky and Cole, Circuit Judges.

Opinion by: Boyce F. Martin, Jr., Chief Circuit Judge. [667]

This case raises an interesting question of sovereign immunity, specifically the question of whether the states gave up their sovereign immunity in bankruptcy matters under the Constitution. The case concerns an appeal from the district court, reversing a pretrial order of the bankruptcy court. H.J. Wilson seeks a refund of corporate excise taxes. The bankruptcy court ruled that Massachusetts' sovereign

immunity was abrogated by the Constitution, denying a motion to dismiss for lack of subject matter jurisdiction. The bankruptcy court further denied a motion to dismiss claiming that the proceeding was not a core proceeding. The district court reversed the bankruptcy court, finding that Massachusetts enjoyed sovereign immunity from suit in this bankruptcy issue, under *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996). As a result of this court's recent holding in *In re Hood*, 319 F.3d 755 (6th Cir. 2003), we REVERSE and REMAND.

H.J. Wilson is a wholly-owned subsidiary of Service Merchandise. As part of their corporate structure, Service Merchandise performs several services for H.J. Wilson and other subsidiaries. These services include payroll, advertising, payment of rent, accounting, etc. Service Merchandise then allocates a proportional share of these expenses to each subsidiary. H.J. Wilson timely filed Foreign Business or Manufacturing Corporate Excise Returns over several years, deducting their apportioned amount of the expenses Service Merchandise shouldered.

Sometime thereafter, the Commissioner of Revenue for the Commonwealth of Massachusetts assessed corporate excise taxes, interest, and penalties against H.J. Wilson. The Commissioner disallowed the deduction for a portion of the expenses. H.J. Wilson paid the assessments and then requested an abatement of the taxes assessed. The Commissioner denied the request, although those assessments are on [668] appeal before the Massachusetts Appellate Tax Board.

In March of 1999, Service Merchandise and H.J. Wilson filed voluntary petitions in the bankruptcy court for Chapter 11 reorganization relief. In August of 2000, H.J. Wilson commenced this adversary proceeding seeking the refund of those assessments related to the corporate excise taxes. H.J.

Wilson also seeks a determination that it does not owe those excise taxes in general.

In September of 2000, the Commissioner filed amended Proofs of Claim Numbers 4845 and 4846, superseding Proof of Claim Number 375, filed in May of 1999. These amended Proofs of Claim included claims for sales taxes from 1996 through 1999. Shortly thereafter, in October, the Commissioner filed a motion to dismiss H.J. Wilson's complaint on the grounds that the court lacked jurisdiction under the Eleventh Amendment and principles of sovereign immunity. In November, the Commissioner filed motions to determine whether or not the issue was a core proceeding and whether or not mandatory or discretionary abstention applied.

In February of 2001, the bankruptcy court denied the Commissioner's motion to dismiss, denied the motion for determination that the adversary proceeding was not a core proceeding, and denied the motion for mandatory or discretionary abstention. The bankruptcy court ruled that it appropriately had jurisdiction over the case under Section 505 of the Bankruptcy Code. It further ruled that sovereign immunity did not apply in this case and that abstention was inappropriate.

The Commissioner appealed this ruling to the District Court for the Middle District of Tennessee. The district court reversed the ruling of the bankruptcy court, finding that that court had no jurisdiction over the Commissioner. Massachusetts was entitled to sovereign immunity, according to the district court, and the Commonwealth did not waive that immunity when it filed Proofs of Claim against H.J. Wilson.

We discussed the proper standard of review for a case like this one in *In re Gibson Group, Inc.*, 66 F.3d 1436, 1440 (6th Cir. 1995), when we said, "We review the judgment of the bankruptcy court directly, and follow its findings of fact

unless clearly erroneous. As to its conclusions of law, however, our review is de novo."

There are four questions lurking in this case, although not all of them are before us today: 1) is the Commissioner entitled to sovereign immunity; 2) is this matter a core proceeding; 3) related, is abstention appropriate; and 4) assuming sovereign immunity exists, did the Commissioner waive that immunity by filing Proofs of Claim against H.J. Wilson?

The question this court must answer is the first, whether or not the Commissioner is entitled to immunity from suits in bankruptcy. While this issue was a novel one to this court during the pendency of this litigation in the bankruptcy court and in the district court, it has since been resolved. Very recently, a panel of this court determined that no sovereign immunity exists as to bankruptcy matters. *In re Hood*, 319 F.3d at 768. We said, "At the Constitutional Convention, the states granted Congress the power to abrogate their sovereign immunity under Article I, section 8. In 11 U.S.C. § 106(a), Congress used that power to grant states a benefit they had sought." *Id.* The panel opinion thoroughly explored the *Seminole Tribe* "framework," *id.* at 761-62, the Constitutional basis, *id.* at 763-64, the "Framers' understanding of the bankruptcy power," *id.* at 764-65, the "States' ceding of sovereign immunity," *id.* at 765-66, and the debates over ratification, *id.* at 766-67. For the reasons set forth in the *Hood* case, [669] we hold that the Commissioner is not entitled to sovereign immunity in this matter.

Because we hold that there is no sovereign immunity in this case, we make no holding as to waiver. Nevertheless, two related questions remain. The district court did not consider the core proceeding and abstention questions, because it found that sovereign immunity existed. The Commissioner recommends that we remand those questions for the district court's determination, citing *Amelkin v.*

McClure, 205 F.3d 293 (6th Cir. 2000), and *Allen v. Board of Education, Unified School District*, 68 F.3d 401 (10th Cir. 1995). We agree with the Commissioner that, "It is for the district court to 'determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases,'" with regard to abstention. *In re Dow Corning Corp.*, 86 F.3d 482, 497 (6th Cir. 1996).

For the foregoing reasons, we REVERSE the decision of the district court and REMAND for further proceedings consistent with this opinion.

Appendix B

B. Judgment of the Court of Appeals for the Sixth Circuit Sought To Be Reviewed.

FILED
June 24, 2003
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 01-6050

In Re: SERVICE MERCHANDISE COMPANY, INC.,et al.,
Debtors

H.J. WILSON COMPANY, INC., Appellant,

v.

COMMISSIONER OF REVENUE FOR THE COMMONWEALTH OF MASSACHUSETTS, Appellee

Before MARTIN, Chief Circuit Judge; KRUPANSY and COLE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT
/S/
Leonard Green, Clerk

Appendix C

C. Order of the Court of Appeals for the Sixth Circuit Denying the Commonwealth's Petition for Rehearing En Banc and Petition for Rehearing.

FILED
September 12, 2003
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 01-6050

In Re: SERVICE MERCHANDISE COMPANY, INC.,et al.,
Debtors

H.J. WILSON COMPANY, INC., Appellant,

v.

COMMISSIONER OF REVENUE FOR THE COMMONWEALTH OF MASSACHUSETTS, Appellee

Before MARTIN, Chief Circuit Judge; KRUPANSY and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/S/
Leonard Green, Clerk

Appendix D

D. Opinion of the District Court for the Middle District of Tennessee at Nashville.

H.J. Wilson Co., Inc. v. Commissioner Of Revenue For The Commonwealth Of Massachusetts (In Re: Service Merchandise Co., Inc., et al.), 265 B.R. 917 (M.D. Tenn. 2001)

June 15, 2001, Entered

Counsel: For Commissioner Of Revenue, appellant: Jeffrey S. Ogilvie, Massachusetts Department of Revenue, Litigation Bureau, Boston, MA., David Thomas Axford, Kitch & Axford, Nashville, TN; For H. J. Wilson Company, Inc., appellee: Paul G. Jennings, Beth A. Dunning, Bass, Berry & Sims, Nashville, TN, John W. Butler, Jr., George N. Panagakis, Skadden, Arps, Slate, Meagher & Flom, Chicago, IL, Alesia Ranney-Marinelli, Skadden, Arps, Slate, Meagher & Flom, New York, NY.

Before Todd J. Campbell, United States District Judge.

[919] MEMORANDUM

This is an appeal from the Bankruptcy Court's Order of February 9, 2001, denying the Defendant/Appellant Commonwealth of Massachusetts' Motion to Dismiss for Lack of Jurisdiction and Motion for Determination that this Adversary Proceeding Is Not a Core Proceeding and Motion for Mandatory Abstention or, in the alternative, for Permissive Abstention. For the reasons stated herein, the Bankruptcy Court's Order is REVERSED and the case is REMANDED for disposition not inconsistent with this opinion.

The fundamental question presented in this appeal is whether the Bankruptcy Court has jurisdiction over the Commonwealth of Massachusetts or if the Commonwealth is entitled to sovereign immunity from this action under the

Eleventh Amendment. The question primarily turns on whether States surrendered their sovereign immunity in bankruptcy matters when they ratified the Constitution.

The standard of review is de novo for questions of law. Investors Credit Corp. v. Batie (In re Batie), 995 F.2d 85, 88 (6th Cir. 1993). The findings of fact of the Bankruptcy Court are subject to a "clearly erroneous" standard of review. Fed. R. Bankr.P. 8013.

H.J. Wilson Co., Inc. ("HJW") seeks to recover from the Commonwealth of Massachusetts ("the Commonwealth") a corporate excise tax refund for the tax years 1987 - 1992. HJW filed timely petitions for abatement with the Massachusetts Appellate Tax Board, which petitions are still pending. On March 27, 1999, HJW commenced voluntary proceedings under Chapter 11 of the United States Bankruptcy [920] Code. On August 7, 2000, HJW filed this adversary complaint against the Commissioner of Revenue for the Commonwealth, seeking a determination that HJW does not owe the 1987-1992 corporate excise tax deficiency assessed against it and seeking a refund from the Commonwealth. The tax refund would necessarily have to be paid out of the Commonwealth's state treasury.

The Commonwealth moved to dismiss the adversary proceeding for lack of jurisdiction, based upon the Eleventh Amendment and principles of sovereign immunity. Alternatively, the Commonwealth moved to dismiss because it was not a core proceeding and moved for mandatory or permissive abstention.

The Bankruptcy Court denied the Commonwealth's Motions, finding no sovereign immunity and concluding that each State surrendered its sovereign immunity on matters of bankruptcy upon joining the Union "upon equal footing with the other states." Bankruptcy Court Order of February 9, 2001, p. 6. Therefore, the Bankruptcy Court concluded, it

could assert jurisdiction over the Commonwealth in this adversary proceeding.

This appeal was taken from that ruling, and this Court granted the Commonwealth's Motion for Stay Pending Appeal (see Docket No. 19) and Motion for Leave to Appeal (see Docket No. 28).

Pending before the Court in this appeal are HJW's Motion for Order Vacating Stay Pending Appeal (Docket No. 27) and the Commonwealth's Motion for Entry of an Order, Nunc Pro Tunc or Otherwise, Allowing its Motion for Leave to Appeal (Docket No. 31). In light of this Order and the Court's Order of June 6, 2001 (Docket No. 28), both Motions are moot.

SOVEREIGN IMMUNITY

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of a Foreign State.

U.S. Const., amend. XI.

The concept of sovereign immunity arises out of the sovereign status of each State and the inherent nature of sovereignty not to be amenable to the suit of an individual without its consent. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 1122, 134 L. Ed. 2d 252 (1996). HJW argues that sovereign immunity is not available as a defense to this litigation because the States surrendered sovereign immunity over bankruptcy matters in the U.S. Constitution on the circumstances presented here. See Appellee's Brief (Docket No. 24), p. 10. HJW contends, and the Bankruptcy Judge found, that the States surrendered their sovereign immunity with regard to bankruptcy matters when

they agreed to Article I, Section 8, in which Congress is given the power to establish uniform bankruptcy laws.

The Court is not persuaded by this argument, particularly in light of the Supreme Court's explanation in Seminole Tribe:

> [C]ontrary to the implication of [the Dissent], it has not been widely thought that the federal antitrust, bankruptcy, or copyright statues abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes; . . . Although the copyright and bankruptcy laws have existed practically since our Nation's inception, . . . there is no established [921] tradition in the lower federal courts of allowing enforcement of those federal statutes against the States.

Seminole Tribe, 517 U.S. 44, 116 S. Ct. at 1132, n.16, 134 L. Ed. 2d 252.

If there were no such sovereign immunity in bankruptcy matters, this language, as it relates to bankruptcy, would be rendered meaningless.

Numerous courts have applied the sovereign immunity doctrine in the bankruptcy context. See, e.g., Sacred Heart Hospital v. Commonwealth of Pa. (In re Sacred Heart Hospital), 133 F.3d 237 (3d Cir. 1998); Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico, 244 F.3d 241 (1st Cir. 2001); NVR Homes, Inc. v. Clerks of Circuit Courts for Anne Arundel County, Md. (In re NVR, LP), 189 F.3d 442 (4th Cir. 1999); Seay v. Tennessee Student Assistance Corp. (In re Seay), 244 B.R. 112 (Bankr. E.D. Tenn. 2000); Scarborough v. Michigan Collection Div. (In re Scarborough), 229 B.R. 145 (Bankr. W.D. Mich. 1999); Pitts v. Ohio Dep't of Taxation (In re Pitts), 241 B.R. 862 (Bankr. N.D. Ohio 1999); and Peterson v. State of Florida (In re Peterson), 254 B.R. 740 (Bankr. N.D. Ill. 2000) (citing cases). In these cases, courts found either that the State did

not waive its sovereign immunity or that Congress did not effectively abrogate that immunity. Such findings impliedly assume that such sovereign immunity exists.

In light of the above authorities, the Court finds the reasoning of Hood v. Tennessee Student Assistance Corp., 262 B.R. 412, 2001 WL 536487 (B.A.P. 6th Cir. May 22, 2001) and Bliemeister v. Industrial Comm'n of Az. (In re Bliemeister), 251 B.R. 383 (Bankr. D.Az. 2000) unpersuasive. In addition, both Hood and Bliemeister involved claims for discharge of certain debts, not a claim to recover money from the State, as we have here. See also Commonwealth of Va. v. Collins (In re Collins), 173 F.3d 924, 929 (4th Cir. 1999) (jurisdiction over dischargeability of debt derives not from jurisdiction over the State but rather from jurisdiction over the debtors and their estates.).

The Supreme Court has recognized only two circumstances in which an individual may sue a State: (1) Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment, and (2) a State may waive its sovereign immunity by consenting to suit. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 119 S. Ct. 2219, 2223, 144 L. Ed. 2d 605 (1999).

By adding Section 106 to the Bankruptcy Code in 1978 and amending it in 1994,[1] Congress attempted to abrogate the

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[1] The Supreme Court held, in Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 109 S. Ct. 2818, 106 L. Ed. 2d 76 (1989), that Section 106(c) of the Bankruptcy Code did not effectively abrogate a State's Eleventh Amendment immunity with respect to a money judgment, if the State had not filed a proof of claim in the case. Thus, in 1994, Congress amended the section to express its intention more clearly.

Eleventh Amendment sovereign immunity in certain bankruptcy matters. 11 U.S.C. § 106. If no such immunity existed, there would have been no need to make such legislative attempts to abrogate it.

In order to determine whether Congress has abrogated a State's sovereign immunity, a court must ask: (1) whether Congress has unequivocally expressed its intent to abrogate immunity, and (2) whether Congress has acted pursuant to a valid exercise of power. Seminole Tribe, 116 S. Ct. at 1123. The Seminole Tribe decision in 1996 raised serious questions about the constitutionality of Section 106. In Seminole Tribe, the Court held that Congress had the power to abrogate a State's sovereign immunity only under the Fourteenth Amendment. [922]

A majority of courts, finding Section 106 to have been enacted pursuant to Congress' bankruptcy powers under Article I, not pursuant to the Fourteenth Amendment, have held Section 106 to be unconstitutional. See, e.g., Arecibo Community Health Care, Inc.; Mitchell v. Franchise Tax Bd., State of California (In re Mitchell), 209 F.3d 1111 (9th Cir. 2000); Dodson v. Tennessee Student Assistance Corp. (In re Dodson), 259 B.R. 635 (Bank. E.D. Tenn. 2001); Grabscheid v. Michigan Employment Sec. Comm'n (In re C.J. Rogers, Inc.), 212 B.R. 265 (E.D. Mich. 1997); Pitts; and Seay. These cases make no mention of sovereign immunity having been surrendered at the adoption of the U.S. Constitution.

As the Court noted in Seminole Tribe:

> Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the

> constitutional limitations placed upon federal jurisdiction.

Seminole Tribe, 116 S. Ct. at 1131-32.

In addition, the Court notes that this case involves an attempt by HJW to "reach into the State treasury" for the recovery of property, an action the Eleventh Amendment and sovereign immunity were specifically designed to prevent. See, e.g., MacDonald v. Village of Northport, Michigan, 164 F.3d 964, 970 (6th Cir. 1999) (citing Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)) and Hutsell v. Sayre, 5 F.3d 996, 999 (6th Cir. 1993).

For all these reasons, the Court finds that the defense of sovereign immunity is available to the Commonwealth in this case.

HJW also argues that the Commonwealth has waived its sovereign immunity by filing a proof of claim. The Bankruptcy Judge did not reach this issue. In Gardner v. New Jersey, 329 U.S. 565, 67 S. Ct. 467, 91 L. Ed. 504 (1947), the Court concluded that when a State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim. A State waives its immunity and consents to suit in federal court by specific declaration or act, such as filing a general appearance, or by the State becoming a plaintiff or an intervenor in the federal lawsuit. Grabscheid, 212 B.R. at 273.

Section 106 of the Bankruptcy Code contemplates such a waiver and provides that the filing of a proof of claim waives sovereign immunity only with respect to a claim against the governmental unit that is property of the estate and that arose

out of the same transaction or occurrence out of which the claim of the governmental unit arose. 11 U.S.C. § 106(b)[2]

The test for finding a waiver of sovereign immunity is a stringent one. College Savings Bank, 119 S. Ct. at 2226. The "same transaction or occurrence" language mirrors the compulsory counterclaim language of Fed. R. Civ. P. 13, which essentially defines a compulsory counterclaim as one arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. The Sixth Circuit's [923] test for determining whether a counterclaim is compulsory is to determine whether the issues of fact and law raised by the claims are largely the same and whether substantially the same evidence would support or refute both claims. Seay, 244 B.R. at 117 (citing Sanders v. First Nat'l Bank & Trust Co., 936 F.2d 273, 277 (6th Cir. 1991)).

When a State files a proof of claim in a bankruptcy proceeding, the State waives its sovereign immunity only with respect to the adjudication of that particular claim. Grabscheid, 212 B.R. at 274 (citing Gardner, 329 U.S. at 571). Otherwise, the adjudication of the State's claim would be transmitted into a suit against the State for monetary damages which would violate the principle that no judgment is sought against the State. Id.

Here, the Court finds that HJW's claim for refund of corporate excise tax for the years 1987 to 1992 (the subject of this adversary proceeding) is not the same transaction or occurrence or claim as the Commonwealth's claim for sales and use tax from September 1996 to March 1999 (the subject of its proof of claim). The taxes arise under different state statutes and from different time periods. There is nothing

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[2] As noted above, however, the majority of courts which have found this code provision to be unconstitutional.

before this Court which would show that the same evidence would support or refute both claims or that the issues of law and fact would be the same.

The Court finds that the Commonwealth's proof of claim does not waive its sovereign immunity and subject it to federal court jurisdiction for purposes of this adversary proceeding.

CONCLUSION

Having found that the Commonwealth is entitled to sovereign immunity from this adversary proceeding, the Court need not address its other arguments. The Order of the Bankruptcy Court is REVERSED and this case is remanded for disposition not inconsistent with this opinion.

IT IS SO ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

Appendix E

E. Opinion of the Bankruptcy Court for the Middle District of Tennessee (Nashville Division).

H.J. Wilson Company, Inc. v. Commissioner of Revenue for the Commonwealth of Massachusetts (In Re: Service Merchandise Company, Inc., et al., Debtors), 262 B.R. 738 (Bankr. M.D. Tenn. 2001)

Decided February 27, 2001.

Counsel: For the Plaintiff: John Wm. Butler, Jr., Charles F. Smith, Skadden, Arps, Slate Meagher & Flom, Chicago, IL.; For the Defendant: Jeffrey S. Ogilvie, Litigation Bureau, Massachusetts Department of Revenue, Boston, MA.

Opinion [740] by Hon. George C. Paine II, U.S.Bankr.Judge

ORDER DENYING (1) DEFENDANT'S MOTION TO DISMISS, (2) MOTION OF DEFENDANT FOR DETERMINATION THAT THIS ADVERSARY PROCEEDING IS NOT A CORE PROCEEDING, AND (3) MOTION OF DEFENDANT FOR MANDATORY ABSTENTION OR, IN THE ALTERNATIVE, FOR DISCRETIONARY ABSTENTION.

This matter came to be heard upon (i) the Defendant's Motion to Dismiss (docket number 7) (the "Dismissal Motion"), filed by the Commissioner of Revenue for the Commonwealth of Massachusetts ("Defendant"), (ii) the Motion of Defendant for Determination that this Adversary Proceeding is not a Core Proceeding (docket number 21) (the "Core Proceeding Motion"), (iii) the Motion of Defendant for Mandatory Abstention or, in the Alternative, for Discretionary Abstention (docket number 22) (the "Abstention Motion"; collectively with the Dismissal Motion and the Core Proceeding Motion, the "Motions"), (iv) the Defendant's Memoranda in support of the Motions (docket

numbers 8 and 23) (collectively, the "Defendant's Memoranda"); (v) the response in opposition to the Motions (docket number 26) (the "Response"), filed by the Plaintiff, H.J. Wilson Company, Inc. ("H.J. Wilson" or the "Debtor"), debtor and debtor-in-possession in the above-captioned cases; and (vi) the reply to the Response (docket number 27) (the "Reply"), filed by the Defendant. The Court having reviewed and considered the Motions, the Defendant's Memoranda, the Response, the Reply and other papers filed in these cases related to this adversary proceeding, and having heard and considered argument of counsel at the hearing on the Motions held on January 23, 2001, and being otherwise sufficiently advised,

THEREFORE, THE COURT HEREBY FINDS AND CONCLUDES:

a. On March 27, 1999, the Debtor filed a voluntary petition in this Court for reorganization relief under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"), thereby commencing a case under the Bankruptcy Code (the "Bankruptcy Case"). Thereafter, the Debtor commenced this adversary proceeding in the Bankruptcy Case, requesting a determination of tax liability under section 505 of the Bankruptcy Code, and further requesting a refund of taxes paid by the Debtor to the Defendant for which the Debtor is found not to be liable.

Sovereign Immunity

b. In the Dismissal Motion, the Defendant asserts that the Debtor may not maintain this adversary proceeding because the Defendant retains sovereign immunity from such an action under the Eleventh Amendment to the United States Constitution. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted, against one of the United States by Citizens of

another State, or by Citizens of subjects of any foreign State." U.S. Const. Amend. XI.

c. A number of lower courts have examined, with diverging opinions, whether section 106(a) of the Bankruptcy Code, which provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section," is unconstitutional in light of the decision by the United States Supreme Court in Seminole Tribe of Florida v. Florida, 517 U.S. 44, [741] 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). However, no federal Circuit Court of Appeals has ruled that section 106(a) is constitutional in light of Seminole. This Court is persuaded by the reasoning of the courts in Bleimeister v. Indus. Comm'n of Ariz. (In re Bliemeister), 251 B.R. 383 (Bankr. D. Ariz. 2000) and Nelson v. State of Wisconsin (In re Nelson), 254 B.R. 436 (Bankr. W.D. Wis. 2000).

d. The concept of sovereign immunity arises out of the sovereign status of each state in the federal system, and "it is inherent in the nature of sovereignty not to be amenable to suit of any individual without consent." Seminole, 116 S. Ct. at 1122 (quoting A. Hamilton, The Federalist Papers, No. 81, at 487 (C. Rossiter ed. 1961) (hereinafter cited as "Federalist, No.—, at —")). Sovereign immunity, however, does not prevent a suit against a state if (1) the state has waived immunity, or (2) Congress has abrogated immunity by an unequivocal expression of intent to do so and does so pursuant to a valid exercise of the power. Nelson, 254 at 440.

e. The states, including the Defendant, have no sovereign immunity in the context of bankruptcies. Nelson, 254 B.R. at 446 (examining sovereign immunity in the context of a dischargeability action); Bliemeister, 251 B.R. at 391. Accordingly, there is no issue whether such immunity has been waived or abrogated. Nelson, 254 B.R. at 446; Bliemeister, 251 B.R. at 391.

f. The Eleventh Amendment must be read broadly not to stand "so much for what it says but more for the presupposition that it confirms." Seminole, 116 S. Ct. at 1122. This presupposition underlying the Eleventh Amendment protection is two-fold: (1) the states are sovereign in the federal system; and (2) a sovereign state cannot be subject to suit without its consent. See Seminole, 116 S. Ct. at 1122; Nelson, 254 B.R. at 440.

g. If the Eleventh Amendment acted to preserve existing sovereign immunity in the context of bankruptcies, then it would be impossible for Congress to abrogate that immunity when enacting bankruptcy laws pursuant to the earlier adopted bankruptcy power granted in section 8 of Article I of the Constitution. Nelson, 254 B.R. at 443. However, if the plan of the Constitution itself abrogated immunity in a particular area, then there is no immunity in such area for the Eleventh Amendment to protect, for the Eleventh Amendment does not act restore the states to their pre-ratification sovereign status. Id. at 443. In other words, a state's decision to ratify the Constitution and be admitted into the Union places that state upon "an equal footing" with other states in surrendering preexisting rights. Id.

h. The area of bankruptcy law "is indeed an area in which there was a surrender of sovereign immunity in the plan of [Constitution]." Nelson, 254 B.R. at 443; see also, Bliemeister, 251 B.R. at 383. The Supreme Court has relied on Alexander Hamilton's analysis in The Federalist Papers as authoritative on the subject of the Constitution and its adoption. See Seminole, 116 S. Ct. at 1119. Citing the power to establish uniform laws on naturalization as an example where the states completely surrendered sovereignty in the plan of the Constitution, Alexander Hamilton explained, that "the power 'to establish a UNIFORM RULE on naturalization throughout the United States [,' must] necessarily be exclusive; because if each State had the power

to prescribe a DISTINCT RULE, there would be no UNIFORM RULE." Federalist, No. 32, at 199; [742] see also, Nelson, 254 B.R. at 443-444 (quoting and relying on Federalist, No. 32, at 199).

i. "The same clause that grants Congress exclusive power over matters of immigration and naturalization gives similar authority over bankruptcy." Nelson, 254 B.R. at 444. Clearly, the issue of debtor-creditor rights is a sensitive issue, as this nation was founded largely by debtors. In that light, the framers chose to make issues of bankruptcy uniform, thereby rendering state sovereignty resigned as of ratification by each state.

j. Accordingly, like the courts in Nelson and Bleimeister, this Court concludes that each state surrendered its sovereign immunity on matters of bankruptcy upon joining the Union "upon equal footing with the other states." Nelson, 254 B.R. at 447 (quoting Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 2247, 2251, 144 L. Ed. 2d 636 (1999)); see also Bliemeister, 251 B.R. at 383. There is no immunity to be claimed in the context of bankruptcies under the Eleventh Amendment and, hence, no issue whether such immunity can be or must be waived or abrogated for a suit against a state to proceed. Nelson, 254 B.R. at 446; Bliemeister, 251 B.R. at 391. Therefore, this Court has jurisdiction over this adversary proceeding brought against the Defendant under section 505 of the Bankruptcy Code.

Core Proceeding and Abstention

k. The Defendant filed the Core Proceeding Motion and the Abstention Motion requesting alternative relief in the event this Court finds that the Defendant was not entitled to the protection of sovereign immunity under the Eleventh Amendment. By the Core Proceeding Motion and the Abstention Motion, the Defendant seeks a finding that this adversary proceeding is not a core proceeding under section 157 of the United States Judicial Code, 28 U.S.C. §§ 1-4001

(the "Judicial Code") and requests that this Court abstain from hearing and determining the issues in this adversary proceeding pursuant to section 1334 of the Judicial Code.

1. Section 1334 of the Judicial Code provides the statutory grant of jurisdiction for bankruptcy cases. It provides in relevant part: "The district court shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Thus, this section provides for federal jurisdiction in three types of proceedings: (i) those that arise under title 11 of the United States Code (the "Bankruptcy Code" or "title 11"); (ii) those that arise in a case under the Bankruptcy Code; and (iii) those related to a case under the Bankruptcy Code. Drexel Burnham Lambert Group v. Vigilant Insurance Company, 130 B.R. 405 (S.D.N.Y. 1991).

m. An action "arises under" the Bankruptcy Code if the relief sought is based upon a right specifically created by the Bankruptcy Code. See Cain Partnership Ltd. v. Pioneer Investment Services Company (In re Pioneer Investment Services Company), 946 F.2d 445, 449 (6th Cir. 1991); In re Howard Beach Fitness Center, Inc., 209 B.R. 307, 311 (S.D.N.Y. 1997). An [sic] claim "arises in" a case under the Bankruptcy Code if, by its very nature, the claim can only be brought in such a bankruptcy case and does not exist outside such bankruptcy case. Pioneer Investment, 946 F.2d at 449. "Related to" proceedings are those that could have been brought in a state court had there been no bankruptcy case filed under the Bankruptcy Code. Id.; see also 28 U.S.C. § 157(c).

n. Section 157 of the Judicial Code distinguishes between core and non-core proceedings. Pursuant to Section 157(b)(1), a [743] bankruptcy court has jurisdiction to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section [157 of

the Judicial Code], and may enter appropriate orders and judgments, subject to review under section 158 of [the Judicial Code]." This section gives bankruptcy judges authority to enter final orders in core proceedings.

o. On the other hand, a bankruptcy court's jurisdiction and authority are more circumscribed in the context of non-core proceedings. Section 157(c)(1) of the Judicial Code does not permit a bankruptcy court to enter a final order as to a non-core proceeding, but states that the bankruptcy court is to "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions." Notwithstanding this limitation, section 157(c)(2) of the Judicial Code permits a bankruptcy court to hear and determine non-core proceedings if the parties consent. Pioneer Investment Services, 946 F.2d at 449.

p. The courts have repeatedly held that the determination of a debtor's tax liability under section 505(a) of the Bankruptcy Code is a core proceeding. U.S. v. Wilson, 974 F.2d 514, 517 (4th Cir. 1992); Holywell Corp. v. The Bank of New York (In re Holywell Corp.), 177 B.R. 991 (S.D. Fla. 1995); Gennari v. U.S. Department of Treasury (In re Educators Investment Corp.), 59 B.R. 910, 913 (Bankr. D. Nev. 1986); Lipetzky v. Dept. of Revenue of the State of Montana (In re Lipetzky), 64 B.R. 431, 434 (Bankr. D. Mont. 1986). Likewise, this adversary proceeding is a core proceeding. Moreover, mandatory abstention pursuant to section 1334(c)(2) of the Judicial Code is not required.

q. Even if this adversary proceeding were not a core proceeding, abstention and remand is not appropriate in this case. Section 1334(c)(1) of the Judicial Code provides for permissive abstention: "Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from

abstaining from hearing a particular proceeding arising under title 11, or arising in or related to a case under title 11." 28 U.S.C. § 1334(c)(1).

r. This Court adopts and incorporates by reference herein, the reasoning of the Court in In re Nana's Petroleum:

> This Court's § 505 determination in the instant Adversary Proceeding will not offend the principles of comity and respect for state adjudication, and so the Court will not abstain from making it. The Court also finds support for not abstaining from making the § 505 determination in the language of § 106(a) and § 505 itself. Section 106(a) states that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to," inter alia, § 505. Section 106(b), which this [the Bankruptcy Court for the Southern District of Florida] has already declared constitutional sets forth the extent to which the governmental unit waives sovereign immunity. Pursuant to §§ 106(a) and (b), a court may make a § 505 determination with respect to a governmental unit that has filed a proof of claim. Section 505(a)(1) authorizes a bankruptcy court to "determine the amount or legality of any tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of [744] competent jurisdiction." Section 505(a)(2), though, prohibits a bankruptcy court from making such a determination if the amount or legality of a tax "was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before commencement of the case under this title[.]" Because no judicial or administrative tribunal determined the amount and legality of the tax liens underlying Tax Collector's claim before the commencement of Plaintiff's Bankruptcy Case, the Court finds that pursuant to 11

> U.S.C. §§ 106 and 505, this court may now make that determination.

234 B.R. 838, 848 (Bankr.S.D.Fla.1999) (emphasis in original).

Likewise, this Court's determination of the issues under section 505 of the Bankruptcy Code in the instant adversary proceeding will not offend the principles of comity and respect for State adjudication.

s. Courts in this district have looked at several factors to determine whether permissive abstention is appropriate: (1) the affect [sic] and lack thereof of the efficient administration of the estate if the court recommends abstention; (2) the extent to which state law issued predominate over bankruptcy issues; (3) the difficulty or unsettled nature of applicable law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than section 1334 of the Judicial Code; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance, rather than the form, of an asserted core proceeding; (8) the feasibility of severing state law claims from core proceeding matters to allow judgments to be entered in the state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceedings in bankruptcy court involves form shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. Refrigerant Reclamation Corp. of America v. Todack (In re Refrigerant Reclamation Corp. of America), 186 B.R. 78, 84 (Bankr. M.D. Tenn. 1995).

t. The court finds that, based on all of these factors, it is appropriate for this Court to maintain jurisdiction of this adversary proceeding, to make a determination as to the issues and claims therein, and to make such a determination

as expeditiously as possible. The Court notes that, inter alia, the determination of the issues and claims in this adversary proceeding arises the context of the Debtors' Bankruptcy Case, which is one part of a large and complex series of administratively consolidated bankruptcy cases for the Debtor and 31 of its affiliates. There is a need for finality and quickness in resolving the issues connected with these bankruptcy cases.

u. Therefore, for all of the foregoing reasons, the Court finds that (i) sovereign immunity does not apply and (ii) this Court should not abstain from hearing and determining the issues in this adversary proceeding.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Motions are denied in their entirety for the reasons stated herein and by the Court on the record.

2. The Defendant shall obtain local counsel within ten (10) days after the entry of this Order.

3. Provided local counsel appears for the Defendant, non-local counsel may appear by telephone at the next pretrial conference, which is currently set for 9:30 [745] a.m., prevailing Central Time, February 27, 2001.